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No. 93-701

FEB 10 1994

In The

Supreme Court of the United States

October Term, 1993

CIRCUIT COURT OF THE FIRST CIRCUIT,
through the Honorable Marie N. Milks,
Criminal Administrative Judge, and ROBERT A. MARKS,
Attorney General of Hawaii,

Petitioners,

vs.

DWIGHT O. DOW,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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SUMMARY OF ARGUMENT

Respondent's opposition, which seeks to justify the inalterable holding of the Ninth Circuit that a mere 14 hours of compelled attendance at drug-alcohol counseling, which Respondent could schedule at his convenience over a three or five day period, triggers the prerequisite of "custody" under the federal habeas corpus statute, 28 U.S.C. § 2254, only proves that the writ should issue, and this Court should reverse the judgment.

ARGUMENT

A. THE REASONING IN *LEHMAN* IS DISPOSITIVE OF THE INSTANT CASE.

Respondent's defense of the judgment below rests virtually entirely upon broad statements from the opinion of this Court in *Jones v. Cunningham*, 371 U.S. 236 (1963), which were expressly circumscribed by *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982), *cited and analyzed*, Pet. at 10. In *Lehman*, this Court rejected the notion that children "in the 'custody' of their foster parents" were "in custody" for purposes of federal habeas. In so doing, this Court also explicitly rejected the notion that reference to "the common law and to practices in the States and in England" are dispositive of the availability of federal review. *Id.* at 514. As the Court held in *Lehman*, the situation of the Lehman children "differs little from the situation of other children in the public generally." *Id.* at 510-11.

Moreover, as the brief *amici curiae* of the States of Arizona, *et al.*, makes clear, the reasoning in *Lehman* is dispositive of the instant case. Every person in society, whether they are required to attend school, or work or to report to social service agencies in order to gain the means of existence, is in "custody" in some sense. However, "custody" in that sense is not the same as that term of art is used by this Court in interpreting the "custody" requirement of the federal habeas statutes and determining the availability of habeas corpus relief. This Court recognized that the writ of habeas corpus is a major exception to *res judicata*. It is strong medicine, particularly where "[f]ederalism concerns" and an "exceptional need for finality" militate against expanding § 2254's "major exception to the doctrine of res judicata." *Id.* at 512.

This case presents none of the actual, severe restraints imposed by the criminal justice system which motivated the exercise of habeas jurisdiction in *Jones* (parole), or in *Hensley v. Municipal Court*, 411 U.S. 345

(1973) (release on his own recognizance with extensive requirements and restriction). *See* Pet. at 6-13. In both *Jones* and *Hensley*, the defendants faced imminent arrest upon their violation of any of the terms or conditions of their parole or release, respectively. Thus, the relevant test for "custody" is, and should remain, whether the habeas petitioner faced an "imminent" "arrest." *Lehman*, 458 U.S. at 509.

B. BASED ON THE FACTS OF THE INSTANT CASE, RESPONDENT IS NOT IN "CUSTODY."

Respondent virtually concedes that nowhere in this record is there even an indication that he faces imminent arrest if he fails to complete his drug-alcohol counselling course. Indeed, unlike the English common law cases (from jurisdictions such as the British Protectorate of Northern Rhodesia) to which Respondent cites, Respondent in the instant case is perfectly free to leave the State, for a weekend in Las Vegas, or, for that matter, Paris or Moscow, without any restraint, so long as he schedules, at his convenience, attendance at the fourteen-hour alcohol counseling class.

This hardly compares with the rigorous, or, in the words of this Court, "significant restraint[s]" at issue in *Jones*, consisting of extended confinement at a particular community, house, and job, at the sufferance of a parole officer, detailed restrictions on the ability to drive a car, associate, and travel, "in constant fear that a single deviation, however slight, might be enough to result in . . . being returned to prison," and subject to arrest "at any time the Board or parole officer believes he has violated a term or condition of his parole," "with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime." *See* 371 U.S. at 242 (notes omitted). Nor does the mere requirement of attendance at an alcohol education class in any manner compare with the "severe restraints" found sufficient in *Hensley*, *i.e.*, an "imminent" "arrest."

The notion that Respondent is the equivalent of "a prisoner," *see Maleng v. Cook*, 490 U.S. 488, 491 (1989), "places form over substance and labels over reality." *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987). Indeed, whether Respondent would even be *charged* with contempt if he failed to complete a drug/alcohol education class is at best speculative because such is a matter over which local law enforcement authorities would be required to assess "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

This is not the stuff of "custody" as the federal habeas statute has been read by this Court, and this Court should grant review for this reason alone.

C. THE NINTH CIRCUIT'S DECISION ADDRESSES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

As the brief *amici curiae* filed by the State of Arizona, and joined by thirty-three States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands attests, this Court should grant review, independently of the above, because the Ninth Circuit's decision, at a minimum, addresses "an important question of federal law which has not been, but should be, settled by this Court." U.S. S. Ct. R. 10.1(c); *see* Pet. at 15-16. The ability of States to quickly and resolutely address the horrific carnage of drunk driving on our Nation's highways, through meaningful, non-custodial sentences, such as the requirements of drug/alcohol education at issue here, free of the heavy costs of federal habeas review, presents precisely the sort of nationwide issue that this Court should promptly address.

Respondent cannot deny that an issue of nationwide import is now squarely raised by this case. Nor is the record clouded by procedural defects or alternative grounds for affirmance of the judgment below. *See* U.S. S. Ct. R. 15.1. At a time when the lower federal courts are already straining under the pressures of their dockets, the federal judiciary's own institutional interests, as well as those of Petitioners and their *amici*, are heavily at stake. Even if the precise issue raised by this Petition has not been addressed elsewhere, *see* Resp. Br. at 6, Rule 10.1(c) of the Rules of this Court irrefutably counsels review here. *See also United States v. Stanley*, 483 U.S. 669, 680-81 (1987) (reversing even though this Court's rulings may not be "strictly controlling, in the sense that no holding can be broader than the facts before the court," because lower federal courts must follow "the reasoning" of this Court's precedents); *accord Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam)

CONCLUSION

For the foregoing reasons and those stated in the Petition and by the Brief *amici curiae* filed by the States of Arizona, *et al.*, the petition for certiorari should be granted, and the judgment of the Ninth Circuit in this case should be reversed.

Dated: Honolulu, Hawaii, February 10, 1994.

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